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PROCEEDINGS AND ORDERS

DATE: 101586

CASE NBR 85-1-06977 CSY
SHORT TITLE Porter, Anthony
VERSUS Illinois

DOCKETED: May 22 1986

Date	Proceedings and Orders
Apr 1 1986	Application for extension of time to file petition and order granting same until May 22, 1986 (Stevens, April 2, 1986).
May 22 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 23 1986	Brief of respondent Illinois in opposition filed.
Jul 2 1986	DISTRIBUTED. September 29, 1986
Oct 3 1986	REDISTRIBUTED. October 10, 1986
Oct 14 1986	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

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No. 86- 0977

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ORIGINAL

ANTHONY PORTER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

Whether the petitioner was denied his right to a fair trial by an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments, when one of the jurors at petitioner's trial failed to reveal her relationship to the mother of one of the victims during the trial court's *voir dire* and, upon disclosure of the juror's potential bias, the trial court failed to conduct any meaningful inquiry, or to permit defense counsel to do so, into the nature and extent of their relationship and the existence of bias.

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OPINION BELOW

The opinion and judgment of the Illinois Supreme Court (A 1) is reported at 111 Ill. 2d 386, 489 N.E.2d 1329 (1986). The judgment and sentence of the Circuit Court of Cook County, Illinois (B 1) is unreported.

JURISDICTION

The final judgment of the Illinois Supreme Court was entered on February 21, 1986. Petitioner was granted an extension of time to and including May 22, 1986 within which to file his petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

United States Constitution, Amendment XIV:
"... [N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

This petition seeks review of a decision of the Supreme Court of Illinois. After a jury trial, the petitioner was convicted of murder, armed robbery, unlawful restraint, and unlawful use of a weapon. The petitioner waived a jury for the sentencing phase of his trial, and the trial court sentenced him to death. On direct review, the Illinois Supreme Court, over the dissent of three of its members, affirmed the convictions and ordered that the trial court's sentence of death be carried out on May 21, 1986. The Court granted petitioner's motion for a stay of the mandate pending the timely filing and disposition of a petition for a writ of certiorari in this Court.

The Trial Court's Voir Dire

Petitioner was indicted and tried in the Circuit Court of Cook County, Illinois for the murder of two persons that he had allegedly killed in the course of an armed robbery. At the outset of the voir dire examination of potential jurors, the trial court asked the potential jurors, who were standing as a group in the courtroom, several general questions pertaining to their ability to act as jurors at petitioner's trial. He then read a list of possible witnesses who might be called to testify by either the

prosecution or the defense. Trial Transcript, Appendix D, D1-D3. One of the names read by the judge was Opie Green, the mother of one of the two victims, Marilyn Green. D2. Although the court read this list of possible witnesses to the potential jurors, he did not ask whether any of them knew any of the persons on the list. None of the potential jurors volunteered that he or she knew any of the possible witnesses, including Opie Green.

The Discovery of Potential Juror Bias

After the jury had convicted petitioner, but before the court had formally dismissed the jury, the court learned that one of the jurors, Isaias Torres, was aware that another juror, Mrs. Lilly B. Trigleth,[1] attended the same church as Opie Green, the mother of Marilyn Green. D4. According to Mr. Torres, another juror informed him that Mrs. Trigleth knew Marilyn Green's mother and attended church with her. Affidavit of Isaias Torres, Appendix C, C1. Although the record does not indicate precisely how the court learned of Mr. Torres' knowledge, it is clear that the court learned of Mrs. Trigleth's relationship with Opie Green through Mr. Torres and not from Mrs. Trigleth herself.

---

1. The trial transcript in People of the State of Illinois v. Porter, Nos. 82-1-7622, 82-1-7655 (Cir. Ct of Cook Cty., Ill. 1983) erroneously denotes the juror as Mrs. Tricklet.

After the court was informed of Mrs. Trigleth's relationship with Marilyn Green's mother, he questioned her briefly about it. The entire discussion with Mrs. Trigleth consisted of the following:

> THE COURT: It was brought to my attention before I actually formally dismissed you that one of the jurors stated that he knew that some other juror purportedly or allegedly went to church -- to the same church as one of the decedent's mother. Is that right, was that you -- please identify yourself.
>
> MRS. TRICKLET [sic]: Yes, but that didn't make any difference to me about that.
>
> THE COURT: Thank you, ma'am. It didn't make any difference?
>
> MRS. TRICKLET: No.
>
> THE COURT: Ma'am, your name again?
>
> MRS. TRICKLET: Lilly B. Tricklet.
>
> THE COURT: It didn't make any difference to you, you abided by your oath and did you recognize that fact when I had read you the name of all the witnesses in the beginning before we even started, you didn't recognize that?
>
> MRS. TRICKLET: No.
>
> THE COURT: When did you finally recognize --
>
> MRS. TRICKLET: After it had got started and everything was going on.
>
> THE COURT: But, it made no difference to you, is that right?
>
> MRS. TRICKLET: No, that is right. D4-D5.

Counsel for the petitioner then sought to question Mrs. Trigleth as to her possible bias against the petitioner.

He argued that "the Court should have questioned this juror in detail as to her relationship to that family and to what particular point and [sic] time she had knowledge, how long she has had the knowledge and [her] rationale for not bringing this to the Court's attention in view of the fact that there are two alternates here." D7.

The court, however, refused to permit further questioning. Although the court's brief questioning of Mrs. Trigleth did not explore any of the areas of inquiry specified by petitioner's counsel, the court nevertheless remarked that

> "[t]his Court will state for the record that in an unusual proceeding, I think probably the most unusual I have ever engaged in in all my years as a lawyer and as a Judge, I did bring back the entire jury and I had not dismissed them and the lady that identified herself was under oath and said for the record that the facts that came to light after the case, sometime after the case had commenced, in earnest, didn't influence her whatsoever. Accordingly, this Court felt that going beyond that regarding that issue is not -- would not have been proper, would have invaded the sanctity of the jury and jury deliberation." D6.

Thus, the trial judge clearly indicated that he considered his brief colloquy with Mrs. Trigleth to have been adequate to dispel any possibility of bias and that any further questioning of her by either the court or counsel would be impermissible. The trial judge told the petitioner's counsel that if he had any objections to "put it in writing." D7.

The Post-Trial Motion for a New Trial

On September 30, 1983, the trial court presided at a hearing on petitioner's motion for a new trial. Among other grounds, the motion asserted that "[t]he defendant did not receive a fair and impartial trial [because] ... [a] juror after being questioned admitted to knowing one of the victims mother [sic] and attending church with the mother." (Petitioner's Motion for a New Trial, p. 2). The claim of jury bias was supported by an affidavit of the juror Isaias Torres. The affidavit stated, in part, that Mrs. Trigleth had told another juror that she knew Marilyn Green's mother, and that upon entering the jury room to begin deliberation, Mrs. Trigleth stated that "as far as she was concerned, they could vote guilty right then...." C2.

In light of the court's earlier statement regarding further questioning of Mrs. Trigleth, petitoner's counsel understandably did not subpoena Mrs. Trigleth to testify at the post-trial hearing, which consisted of a short argument by counsel for petitioner and for the state.[2] At the close

2. Counsel's apparent understanding as to the opportunity to question Mrs. Trigleth further was confirmed by the assistant state's attorney, who stated that "we went into this [the judge's questioning of Mrs. Trigleth before dismissing the jury] just for the purposes of today's hearing." (Post-Trial Trans., p. 4).

of the hearing on petitioner's motion, the trial court denied the request for a new trial. Petitioner appealed his convictions and death sentence directly to the Illinois Supreme Court as required by Illinois Supreme Court Rule 603, Ill. Rev. Stat., ch. 110A, ¶ 603 (1971).

The Illinois Supreme Court's Decision

On February 21, 1986, the Illinois Supreme Court, by a 4-3 vote, affirmed petitioner's convictions and death sentence. The court rejected petitioner's argument that he had been denied his right to trial by an impartial jury. A6-9. In particular, the majority of the court determined that although "the court's inquiry could have, and possibly should have, been more searching to determine the nature of the relationship between the juror and Ms. Green's mother," the petitioner did not meet his burden of establishing prejudice. A8. The majority reasoned that petitioner was foreclosed from complaining about the trial court's conduct because the petitioner should have subpoenaed Mrs. Trigleth to testify at the hearing on the post-trial motion for a new trial or attached an affidavit from Mrs. Trigleth.

Justices Clark, Goldenhersh and Simon dissented from the court's decision. Justice Clark dismissed the majority's suggestions that the petitioner could have subpoenaed Mrs. Trigleth or attached her affidavit to the post-

trial motion as "unrealistic" in light of the trial court's conduct during its examination of Mrs. Trigleth. A10. Although the majority had stated that Mrs. Trigleth's failure to come forward with the information that she knew Mrs. Green could have resulted not from intentional concealment but from "the fact that she did not know the woman's name," Justice Clark argued that it was just as likely that her concealment resulted from her desire "to remain on the jury to make sure that the defendant would get 'proper punishment.'" A10.

In a separate dissent, Justice Simon stated that the petitioner's right to trial by an impartial jury had been denied by the trial judge's failure to explore those facts that might have established Mrs. Trigleth's bias. A11-12. In reviewing the trial court's conduct, Justice Simon found that "more extensive questioning was imperative," and that, in particular, the trial court should have determined "at precisely what point during the trial the juror became aware that she knew the mother or why she failed to bring it to the judge's attention promptly." A12. Moreover, Justice Simon stated that the petitioner was denied his due process right to a hearing at which he could inquire into the juror's bias as required by this Court's decision in Smith v. Phillips, 445 U.S. 209 (1982).

REASONS FOR GRANTING THE WRIT

One of the most important rights guaranteed by the Constitution is the right of a defendant to a trial by an impartial jury. The Sixth Amendment provides that the accused in a criminal prosecution is entitled to trial by an impartial jury comprised of unbiased and "'indifferent' jurors." Irwin v. Dodd, 366 U.S. 717, 722 (1961). This Court has held on numerous occasions that this right, in combination with the due process clause, requires an opportunity to prove actual bias. See, e.g., Dennis v. United States, 339 U.S. 162 (1952); Smith v. Phillips, supra.

Here the fact of Mrs. Trigleth's relationship with the victim's mother, combined with her failure to inform the court during the voir dire or later of that relationship, and her comments upon entering the jury room, see C2, provide a strong inference of juror bias. In the face of such a high probability of bias, the trial court should have conducted a searching inquiry to determine whether actual bias existed. The trial judge, however, conducted only the most perfunctory inquiry into Mrs. Trigleth's potential bias. The court then compounded that error by refusing to permit petitioner's trial counsel to conduct any inquiry himself. The trial court thus clearly denied the petitioner his due process right to a hearing, and with it, the right to an impartial jury.

The constitutional right to trial by an impartial jury will have little significance if the right to a hearing to prove actual bias may be satisfied by the kind of cursory "hearing" conducted by the trial court here. If the Illinois Supreme Court's decision is allowed to stand, then trial courts will be free to deprive defendants of a meaningful hearing that is crucial to one of our most fundamental and important rights.

GIVEN THE LIKELIHOOD OF BIAS, AND THE TRIAL COURT'S FAILURE TO AFFORD PETITIONER WITH A MEANINGFUL OPPORTUNITY TO PROVE ACTUAL BIAS, THE DECISION OF THE ILLINOIS SUPREME COURT IS CONTRARY TO THE DECISIONS OF THIS COURT AND SHOULD BE REVERSED.

This Court recently stated that "[o]ne touchstone of a fair trial is an impartial trier of fact -- 'a jury capable and willing to decide the case solely on the evidence before it.'" McDonough Power Equipment Co. v. Greenwood, 464 U.S. 548, 554 (1984). In this case, the record reflects a very high probability that the petitioner was tried and convicted by a jury that did not consider only "the evidence before it." The mere fact that a juror attended church with the victim's mother creates such an inference. In addition, although Mrs. Trigleth was aware of the relationship during the trial, she never informed the trial court that she knew Marilyn Green's mother until she was confronted with the fact after another juror brought it to the Court's attention.

The inference of bias was further strengthened by the fact that she had stated upon entering the jury room to begin deliberations that "as far as she was concerned, they could vote guilty right then." C2.

In light of these facts, the trial court should have conducted a careful inquiry into the facts surrounding Mrs. Trigleth's relationship with Opie Green. This Court has held on numerous occasions that "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 168 (1950); see also Smith v. Phillips, 445 U.S. 209, 216 (1982); Irwin v. Dodd, 366 U.S. 717, 722 (1961). The "opportunity to prove actual bias" requires a "hearing with all interested parties permitted to participate." Remmer v. United States, 347 U.S. 227, 230 (1954); see also Smith v. Phillips, supra, 455 U.S. at 216.[3]

In this case, the trial court neglected to undertake the inquiry required by this Court's decisions. The court became aware of the potential bias of a juror before

3. Moreover, this Court has stated that in the context of potential bias during the impaneling of a jury the trial judge "must be zealous to protect the rights of the accused." Dennis v. United States, supra, 339 U.S. at 168; see also Wainwright v. Witt, ___ U.S. ___, 105 S. Ct. 844, 855 (1985); Smith v. Phillips, supra, 455 U.S. at 217 (a defendant tried by a jury of his peers must be afforded the protection of a "trial judge ever watchful to prevent prejudicial occurrences...."). That obligation is even more compelling when the potential bias first comes to light after a guilty verdict.

the jury had been formally dismissed. After confirming that Mrs. Trigleth went to the same church as the mother of one of the victims, the court should have explored the nature and length of the relationship as well as why Mrs. Trigleth did not volunteer the information herself. Instead, the court asked leading questions clearly designed to elicit from her the statement that her verdict was not affected by the relationship. Moreover, the court accepted, without any further questions, a vague answer from Mrs. Trigleth in response to the question as to when she became aware that Opie Green was the victim's mother. D4-D5.

Not only did the judge stop his inquiry after a few pro forma questions, but he also stated that asking more probing questions would invade "the sanctity" of the jury's deliberations. The brevity of the court's inquiry, the leading nature of the questions asked, and the comments made by the judge regarding any further questioning all indicate that the trial court failed to fulfill its obligation to insure that the petitioner was afforded a fair trial by an impartial jury. See, e.g., Dennis v. United States, supra; Smith v. Phillips, supra; State v. Williams, 230 S.E.2d 742, 747 (W. Va. 1976).

The court then compounded this error by refusing to permit petitioner's counsel the opportunity to conduct an inquiry himself. The Illinois Supreme Court held that

petitioner had such an opportunity but had failed his burden of proving actual bias on the part of Mrs. Trigleth. A8-9. The court failed to recognize, however, that before the accused must meet his burden of proving bias, Murphy v. Florida, 421 U.S. 794, 800 (1975), he is entitled to a hearing at which he is afforded the right to participate and to attempt to establish the juror's actual bias. See, e.g., Smith v. Phillips, supra; United States v. Littlefield, 752 F.2d 1429, 1431 (9th Cir. 1985); United States v. Billups, 692 F.2d 320, 325 (4th Cir. 1982); cert. denied, 464 U.S. 820 (1983).

Petitioner had no chance to do so here. After asking Mrs. Trigleth perfunctory questions which fell far short of testing her bias, the trial court denied the petitioner the opportunity to question Mrs. Trigleth. Indeed, the court made it clear that it would never permit such questioning. Responding to the petitioner's request to ask Mrs. Trigleth questions clearly relevant to the issue of bias that the court had failed to ask, the judge stated that "going beyond that [the judge's questioning] regarding that issue is not -- would not have been proper, would have invaded the sanctity of the jury and jury deliberation." D6.[4] It is clear from the record that the petitioner was

4. The trial judge then remarked to counsel for the petitioner that "[a]t a further time you may put it in writing, whatever you state in writing...." D7.

denied his right to ask even the most basic questions of the juror to attempt to establish the actual bias required by this Court's decision in Smith v. Phillips, supra.

As Justice Simon stated in dissent, the majority erred in holding, solely on the basis of the petitioner's failure to subpoena Mrs. Trigleth to attend the post-trial hearing, that the petitioner's right to an impartial jury was not denied:

> It is no answer to say, as the majority does, that the defendant is at fault for not making the right moves. The question of juror bias, unlike a mere evidentiary irregularity, goes to the heart of the judicial process. Whether or not the defendant exercised every available option, a guilty verdict in a case in which the process itself has been tainted cannot be affirmed. A13-14.

The petitioner reasonably decided that an attempt to obtain a court-ordered subpoena against Mrs. Trigleth would have been futile in light of the trial judge's earlier statements. Moreover, the trial court denied the petitioner the opportunity to question Mrs. Trigleth before the jury had been discharged, while she was present in court and under oath. This was precisely the time at which the juror would have faced the most difficulty concealing her true feelings and the examination would most likely have been effective. A12; cf. People v. Andrews, 149 Cal. App. 3d 358, 367 (2d Dist. 1984). In addition, the trial court's comments that

defense counsel could "put it in writing," and that Mrs. Trigleth "was not on trial, Mr. Porter was ...," were further evidence of the judge's determination to foreclose inquiry into the issue of jury bias.

In sum, the petitioner was effectively denied the right to examine the juror for bias and to determine if she had willfully concealed during the voir dire the fact that she knew the mother of one of the victims. See, e.g., McDonough Power Equipment Co. v. Greenwood, supra. The trial court did not even inquire as to the nature of the relationship and whether it had an effect on the juror's ability to decide the case solely on the evidence before her. Moreover, the trial court refused to allow the petitioner's trial counsel to ask the juror questions which at the very least would have established how well the juror in fact knew Marilyn Green's mother. Under these circumstances, as Justice Simon noted, "the process itself has been tainted...." This Court should grant this petition in order to remove that taint and to outline for lower courts the process that is due to a criminal defendant when evidence comes to light during a trial indicating a reasonable likelihood of juror bias. It must be made clear that a criminal defendant's right to an impartial jury encompasses a meaningful opportunity to determine whether actual bias exists. See Irwin v. Dodd, supra.

Chief Justice Warren stated in concurrence in Estes v. Texas, 381 U.S. 532, 565 (1965): "[O]ur common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose -- to provide a fair and reliable determination of guilt." The right to an impartial jury is the most crucial element in insuring such a fair and reliable determination. If the Illinois Supreme Court's holding is not reversed, however, that right will no longer be guaranteed.

CONCLUSION

For the reasons stated, the petition for a writ certiorari should be granted and the decision of the Illinois Supreme Court reversed.

Respectfully submitted,

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The PEOPLE of the State of Illinois, Appellee,

v.

Anthony PORTER, Appellant.

No. 59336.

Supreme Court of Illinois.

Feb. 21, 1986.

Defendant was convicted in the Circuit Court, Cook County, Robert L. Sklodowski, J., of armed robbery and unlawful restraint, murder, and unlawful use of weapons, and he appealed. The Supreme Court, Ryan, J., held that defendant was not deprived of his right to trial by an impartial jury.

Affirmed.

Clark, J., filed dissenting opinion in which Goldenhersh and Simon, JJ., joined.

Simon, J., filed dissenting opinion in which Goldenhersh, J., joined.

1. Criminal Law ⇐1063(1)

Trial counsel in death penalty case has obligation to comply with statutory provisions governing motions for new trial, S.H.A. ch. 38, ¶ 116-1, even though death penalty cases are automatically reviewed. S.H.A. Const. Art. 6, § 4(b).

2. Jury ⇐131(10)

Scope of voir dire examination did not deny defendant his constitutional right to trial by impartial jury, despite defendant's contention that trial court should have asked prospective jurors whether they were acquainted with any of the parties, attorneys, witnesses, victims, or their families and whether they were in any manner familiar with facts of the case; defense counsel did not request that the court ask either of those questions. U.S.C.A. Const. Amend. 6; S.H.A. ch. 110A, ¶ 234.

3. Jury ⇐131(18)

Juror's failure to disclose during voir dire that she went to same church as mother of one of murder victims did not deprive defendant of his right to trial by impartial jury in prosecution for that murder and other crimes; nothing in record supported defendant's contention that the juror was friend of the victim's mother, but rather, record only showed that the juror, during course of trial, learned that she knew victim's mother from church. U.S.C.A. Const. Amend. 6; S.H.A. ch. 38, ¶ 9-1(a)(1, 2).

4. Jury ⇐99(2)

Juror's statement upon entry into deliberation room before any discussion was had on the evidence, that, as far as she was concerned, they could vote guilty right then, together with fact that same juror had learned during course of trial that she knew victim's mother as someone who attended same church that she attended, did not establish that she had previously determined defendant's guilt and that defendant was thereby deprived of his right to trial by impartial jury. U.S.C.A. Const.Amend. 6; S.H.A. ch. 38, ¶ 9-1(a)(1, 2).

5. Criminal Law ⇐1044(1), 1170

Defendant waived issue not raised in his written motion for new trial or in his appellate brief. S.H.A. ch. 110A, ¶ 341(e)(7).

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RYAN, Justice:

Following a jury trial in the circuit court of Cook County, the defendant, Anthony Porter, was found guilty of the armed robbery and unlawful restraint of Henry Williams (Ill.Rev.Stat.1981, ch. 38, pars. 18-2, 10-3), the murder of Marilyn Green (two counts) (Ill.Rev.Stat.1981, ch. 38, pars. 9-

1(a)(1), (a)(2)), the murder of Jerry Hillard (two counts) (Ill.Rev.Stat.1981, ch. 38, pars. 9–1(a)(1), (a)(2)), and two counts of unlawful use of weapons (Ill.Rev.Stat.1981, ch. 38, pars. 24–1(a)(10), (b)). The State requested a separate sentencing hearing to consider whether the death penalty should be imposed. The defendant waived a jury for the penalty hearing (Ill.Rev.Stat.1981, ch. 38, par. 9–1(d)(3)), and the trial judge found the existence of a statutory aggravating factor (Ill.Rev.Stat.1981, ch. 38, par. 9–1(b)(3) (defendant convicted of murdering two individuals)) and concluded that there were no mitigating factors sufficient to preclude the imposition of the death penalty. Accordingly, the trial court sentenced the defendant to death for the murders of Marilyn Green and Jerry Hillard. (Ill.Rev.Stat.1981, ch. 38, par. 9–1(h).) The death sentence was stayed (87 Ill.2d R. 609(a)), pending direct appeal to this court (Ill. Const.1970, art. VI, sec. 4(b); Ill.Rev.Stat. 1981, ch. 38, par. 9–1(i); 87 Ill.2d R. 603). The trial court also sentenced the defendant to a concurrent prison term of 30 years for the armed-robbery and unlawful-restraint convictions and the first unlawful-use-of-weapons conviction. The trial court determined that the second unlawful-use-of-weapons conviction "merged into [the] other counts." The defendant's subsequent motion for a new trial was denied by the trial court.

The defendant contends that he was denied his constitutional right to a trial by an impartial jury and that the trial court erred in denying his motion for a new trial. For the reasons set forth below, we affirm the defendant's convictions and sentences.

The following evidence was presented at the defendant's trial. On August 15, 1982, at approximately 1 a.m., Henry Williams and William Taylor went to Washington Park in Chicago. They climbed a fence to enter the pool area in the park and went swimming. At the same time, Jerry Hillard and his fiancee, Marilyn Green, were sitting in the upper portion of bleachers located to the west of the pools. After swimming for a while Williams decided to get out of the water. As he was putting on his pants, the defendant approached with a gun in his hand and asked Williams if he had any money. The defendant put the gun up to Williams' forehead, took $2 from his pocket, and then left. Williams continued to get dressed and looked for Taylor, who was still in the pool. He then saw the defendant up in the bleacher area within three or four feet of Jerry Hillard with a gun pointed at Hillard. Williams finished dressing, and as he jumped back over the fence he heard several shots.

Taylor had continued to swim after Williams left the pool. He got out of the water and as he was drying off he saw the defendant up in the north end of the bleachers. The defendant was standing less than two feet from Hillard with his arm extended and a gun in his hand. The defendant shot Hillard. Hillard fell back, and the defendant shot him again. The defendant then ran down the bleachers toward Taylor, passed within three feet of him, and left the pool area to the south. Taylor went up to where Hillard had fallen. He did not see Marilyn Green shot.

Shortly after 1 a.m., on August 15, 1982, Officer Anthony Liance, of the Chicago police department, responded to a call that a man had been shot in Washington Park. As he approached the pool area from the north he observed Marilyn Green running from the north end of the bleachers. She was holding her neck with her right hand and pointed to the south end of the bleachers with her left hand. Liance continued to approach the pools and saw a person whom he later identified in court as being the defendant, running south next to the bleachers. He stopped and frisked the defendant, but let him go because he did not find a weapon on him. After running past Officer Liance, Green staggered toward Officer B. Johnson and his partner. The two officers were issuing a motorist a traffic citation at the time. Johnson helped Green into a squad car and noticed that there was a hole in her neck. She was taken to a hospital where she died.

Officer Dennis T. Dwyer and his partner also responded to the call. As they approached the pools from the north, Williams walked out from the bleachers and told them that a man had been shot up in the bleachers. Dwyer observed Hillard on the top step of the bleachers lying on his back and bleeding from the head. Hillard was taken to a hospital where he underwent surgery and later died.

Cook County Deputy Medical Examiner Joanne Richmond performed autopsies on both Marilyn Green and Jerry Hillard. Green had received three "through and through" gunshot wounds. She was shot twice in the right side of the neck at close range; within approximately 1 to 1½ feet. She was shot a third time in the left hand. Green died from massive bleeding due to multiple gunshot wounds. Hillard had been shot twice at close range; once above the left eye and once on the left side of the head. There was also a "black powdery substance" on the back of his left hand. Hillard died from multiple gunshot wounds to the head.

Both Henry Williams and William Taylor were taken by the police from the pool area to a police station. Williams identified a photograph of the defendant in a mug book. He testified that he had seen the defendant in the neighborhood almost every day for a period of about a year and a half before Hillard and Green were shot. Taylor also identified a photograph of the defendant in a mug book. He had seen the defendant in the neighborhood once or twice a month for a period of two to three years prior to the shootings. Taylor testified that when he was at the police station on August 15, 1982, he told the police that he did not see the defendant shoot Hillard because he was afraid for his life. He had seen the defendant mug two old men and said that one of his friends had been jumped by the defendant. Taylor was living with his 95-year-old great-grandmother and stated that since he had to leave her alone when he went to work, he feared for her safety. On August 18, 1982, Taylor viewed a lineup at a police station and again identified the defendant.

The parties stipulated that the defendant was over 17 years old on the date of the occurrence. We note that the police officer who arrested the defendant on August 17, 1982, testified at trial that the defendant stated at the time of his arrest that he was 27 years old. The parties also stipulated that on October 6, 1980, the defendant had been convicted of robbery and that he was released from prison on that conviction on November 13, 1981.

The defendant called three witnesses on his behalf. Eric Werner, a professional photographer, presented testimony regarding the physical appearance of the pool area at Washington Park. Werner had photographed the area at the request of the defendant's counsel. The pictures were taken more than one year after Marilyn Green and Jerry Hillard were shot.

Kenneth Doyle also testified for the defendant. He stated that he was at the defendant's mother's house during the evening of August 14, 1982, and sat on the back porch with the defendant drinking until about 2 a.m. the next morning. At that time he went with the defendant and a friend to a nearby playground where they talked and continued to drink until 9 a.m. On cross-examination Doyle admitted he had talked to two detectives on August 17, 1982, and told them that he was drinking with the defendant until about 10:30 p.m. on August 14, 1982, and then spent the rest of the night at home with his mother. At trial Doyle explained that he lied to the police because he was afraid he was going to be "locked up."

Finally, the defendant called Georgia Moody, the "common law" wife of one of his brothers. She saw the defendant at his mother's house during the evening of August 14, 1982, playing cards with her children along with Doyle. She testified that the defendant and Doyle did not go out on the porch and were not, to her knowledge, drinking. According to her, the defendant left the house at about 2:30 a.m. on August 15, 1982, with Doyle and a friend. The defense then rested.

The jury deliberated for approximately nine hours and found the defendant guilty of all charges. The jury was polled and then allowed to go home for the night, and it returned the next morning. That morning the State requested a sentencing hearing to consider whether the death penalty should be imposed. The defendant elected to waive his right to a jury for purposes of the two-phase death penalty hearing.

During the first phase of the death penalty hearing arguments were presented by both the State and the defense in regard to the defendant's eligibility for the death penalty. In addition, a certified copy of the defendant's birth certificate, showing defendant to be in excess of 18 years of age, and the verdict forms from his trial were admitted into evidence. The trial judge found that the defendant had been convicted of murdering two or more individuals and that he had attained the age of 18 at the time he committed the murders. The judge therefore held that the defendant was eligible for the death penalty. At this time the judge had the jurors brought into the courtroom for the purpose of formally dismissing the jury. An oral motion for a mistrial was made by the defendant at that time. The court denied the motion, with leave to file a written motion later. The basis for the defendant's motion will be discussed below.

During the second phase of the death penalty hearing before the court, evidence was presented concerning matters in aggravation and mitigation. The following evidence was presented by the State in aggravation. On April 27, 1979, the defendant was placed on a two-year period of probation for bail jumping. The defendant violated his probation two months later when he robbed and beat Douglas McGhee. McGhee had been sitting on the bleachers next to the pools in Washington Park. On October 6, 1980, the defendant pleaded guilty to robbery and bail jumping and was sentenced to three years in the Illinois Department of Corrections. The defendant was released from prison on November 13, 1981, and was placed on parole for a period of two years.

On August 1, 1982, while on parole, the defendant got into an argument with a man in the neighborhood named Earl Lewis. The defendant had walked by and kicked Lewis' dog. When the defendant passed by again Lewis asked him why he kicked the dog. The defendant threatened to hurt Lewis, but then started to walk away. He then returned and placed a gun to Lewis' head and fired. The bullet grazed Lewis' forehead, who escaped much more serious injury by moving back just as the gun was fired. (On August 4, 1983, the defendant pleaded guilty to the aggravated battery of Earl Lewis and was sentenced to six years in the Illinois Department of Corrections.) Two weeks after the defendant shot Earl Lewis, he committed the offenses that are the subject of this appeal.

The following evidence was presented by the defendant in mitigation. The defendant had attended a church and for approximately two years had helped clean the church. He had assisted an elderly gentleman who was recuperating from a heart attack by taking out the garbage and getting medicine for him. He also had assisted his godmother, who suffered from epileptic seizures, by cleaning her house, making her food, and helping her take her medicine. The defendant has five children; three from one relationship and two from another relationship. The defendant's mother, Clara Porter, related how she had tried to raise nine children in the housing project by herself. In addition, several witnesses expressed the opinion that the defendant could be turned into a useful citizen if he were given a chance and asked that his life be spared.

Following arguments of counsel, the trial court concluded that there were not mitigating factors sufficient to preclude the imposition of the death penalty. The defendant's subsequent written motion for a new trial was denied.

The defendant contends that he was denied his constitutional right to a trial by an impartial jury. He first argues in support of this contention that the scope of the *voir*

dire examination as conducted by the trial court did not provide him with sufficient information to request challenges for cause or to intelligently exercise his right of peremptory challenge. The State argues that the adequacy of the *voir dire* examination was not raised in the defendant's written motion for a new trial and thus has been waived. Alternatively, the State maintains that the trial court's *voir dire* examination of the venire was thorough and meticulous. Defendant's second point under his basic contention is that a member of the jury knew the mother of one of the victims, which fact did not come to light until after the jury had reached a verdict.

As previously stated, after the guilty verdict the jury was polled and then was allowed to go home for the night. The next morning, before the hearing commenced as to the penalty, the defendant waived his right to a jury for the death penalty hearing. The trial court conducted the hearing and determined that the defendant was eligible for the death penalty. At that point, before the second phase of the death penalty hearing (the aggravation-mitigation phase), the judge noted for the record that the jury had not been formally dismissed. When the jury was brought into court to be discharged, the following colloquy took place, which is the basis for defendant's second point, that is, that a member of the jury knew the mother of one of the victims:

"THE COURT: Ladies and gentlemen, I did not formally dismiss you so you are still under oath, under the oath that you took as jurors. It was brought to my attention before I actually formally dismissed you that one of the jurors stated that he knew that some other juror purportedly or allegedly went to church—to the same church as one of the decedent's mother. Is that right, was that your—please identify yourself.

MRS. TRICKLET [*sic*] [The juror's name was Lillie B. Trigleth]: Yes, but that didn't make any difference to me about that.

THE COURT: Thank you, ma'am. It didn't make any difference?

MRS. TRICKLET: No.

THE COURT: Ma'am, your name again?

MRS. TRICKLET: Lilly B. Tricklet.

THE COURT: It didn't make any difference to you, you abided by your oath and did you recognize that fact when I had read you the name of all the witnesses in the beginning before we even started, you didn't recognize that?

THE COURT: When did you finally recognize—

MRS. TRICKLET: After it had got started and everything was going on.

THE COURT: But, it made no difference to you, is that right?

MRS. TRICKLET: No, that is right.

THE COURT: I will now formally dismiss you. You are all dismissed.

* * * * * *

THE COURT: The jury is dismissed. We will proceed as indicated.

* * * * * *

MR. GURSEL [Defense Attorney]: I would like to speak for the record. Judge, this woman has indicated that she—this case was not over when it came to her attention that she knew a member of this family. That matter was supposed to have been brought to this Court's attention. We had two alternates, two alternate jurors. At this point and [*sic*] time I am asking this Court for an opportunity to present information to this Court to prepare for a mistrial and respectfully come before this Court and ask that the judgments entered on the record of conviction as to Anthony Porter be set aside and that he be given a new trial, Judge.

THE COURT: Any motion for mistrial relative to what just occurred are [*sic*] premature at this time. If anything, you can present those [*sic*] after the entire hearing.

* * * I did bring back the entire jury and I had not dismissed them and the lady that identified herself was under oath and said for the record that the

facts that came to light after the case, sometime after the case had commenced, in earnest, didn't influence her whatsoever.

* * * * * *

MR. GURSEL: * * * I believe that the Court should have questioned this juror in detail as to her relationship to that family and to what particular point and [*sic*] time she had knowledge, how long she has had the knowledge and rationale for not bringing this to the Court's attention in view of fact that there are two alternates here.

THE COURT: This Court feels it didn't abuse its discretion. This Court hereby accordingly denies motion for mistrial. At a further time you may put it in writing, whatever you state in writing, you are welcome. * * *"

A short time after the above colloquy defense counsel again requested a mistrial. The State objected to the motion on the ground that it was not in writing and also on the ground that it was not timely. The trial court denied the motion, stating that defense counsel could outline in writing anything deemed pertinent to a motion for a "new trial."

[1] We consider now defendant's issue concerning the adequacy of the *voir dire*. The general rule followed by this court is that the failure to raise an issue in a written motion for a new trial constitutes a waiver of that issue and it cannot be urged as a ground for reversal on review. (*People v. Pickett* (1973), 54 Ill.2d 280, 282, 296 N.E.2d 856) Here, the defendant's written motion for a new trial did raise the issue of whether he was denied a trial by an impartial jury. It specifically referred to the presence on the jury of a woman that attended the same church as the mother of one of the victims, but the motion did not question the adequacy of the *voir dire* examination. We again emphasize that although death penalty cases such as this are automatically reviewed by this court under our constitution (Ill. Const.1970, art. VI, sec. 4(b)), trial counsel continues to have an obligation to comply with the statutory provisions governing motions for a new trial. Ill.Rev.Stat.1981, ch. 38, par. 116-1; *People v. Caballero* (1984), 102 Ill.2d 23, 32-33, 79 Ill.Dec. 625, 464 N.E.2d 223.

As to the adequacy of the *voir dire*, the trial court began the examination by reading each of the charges that had been brought against the defendant. It then read the names of the defendant, the defendant's two attorneys, the two assistant State's Attorneys, and the potential witnesses. The court also informed the prospective jurors as to fundamental principles of law such as the presumption of innocence and the burden of proof. Thereafter, the court asked the group seven "general" questions. The first general question was whether there were any hardships that would prevent them from serving on the jury. The second general question was whether they had scruples which would prevent them from imposing the death penalty under any circumstances. Other general questions involved whether they had served on a petit or grand jury, whether they had participated in a criminal case as a complainant or defendant or in any other capacity, and whether they had been the victim of a crime. The last general question asked by the trial court was "Do you know of any reason why you may be prejudice for or against the State or the defendant because of the nature of the charges or otherwise?"

Next, the court questioned the prospective jurors individually. After reviewing their responses to the seven general questions, it inquired into personal factors such as residence, family, and employment. The court also asked the prospective jurors whether they would be prejudiced against a person that had been convicted of a crime and whether there was any reason they could not be fair to either side. Although the trial court asked all the questions during the *voir dire* examination, it did allow the parties to submit additional questions. Defense counsel submitted to the court four supplemental questions. As requested, the court agreed to ask the prospective jurors whether they had scruples which

would prevent them from even considering the death penalty and whether they had feelings for or against people living in public housing. It refused to ask the prospective jurors whether they had any black friends and about their feelings regarding members of street gangs. The trial court granted numerous requests by defense counsel for sidebar conferences, several of which were used by defense counsel to record the race of those excluded by the State through peremptory challenges. Finally, on several occasions defense counsel interrupted the *voir dire* examination to request background information about prospective jurors.

Our Rule 234 (87 Ill.2d R. 234), made applicable to criminal cases by Rule 431 (87 Ill.2d R. 431), provides in pertinent part:

> "The court shall conduct the *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, or may permit the parties to supplement the examination by such direct inquiry as the court deems proper."

Thus, the manner and scope of the *voir dire* examination is left to the discretion of the trial court. However, it may constitute reversible error if the court fails to permit pertinent questions that would enable a party to determine whether the jurors are free from bias or prejudice which would constitute a basis for challenge for cause, or which would enable a party to intelligently exercise his or her right of peremptory challenge. *People v. Lobb* (1959), 17 Ill.2d 287, 300, 161 N.E.2d 325.

[2] The defendant maintains that the trial court should have asked the prospective jurors during *voir dire* whether they were acquainted with any of the parties, attorneys, witnesses, victims, or their families and whether they were in any manner familiar with the facts of the case. However, defendant's counsel did not request that the court ask either of those questions. If defense counsel had felt that he did not have sufficient information concerning any of the prospective jurors he could have asked the court to inquire further by submitting additional questions as authorized by Rule 234. We noted above that defendant did submit four additional questions. The court asked two of the supplemental questions submitted by the defendant and he has not alleged that the court erred in refusing to ask the other two questions he submitted. We hold that the scope of the *voir dire* examination as conducted by the trial court did not deny the defendant his constitutional right to a trial by an impartial jury.

[3] The defendant's second argument supporting his contention that he was deprived of his right to trial by an impartial jury is that the trial court erred in denying his motion for a new trial which was based in part on the fact that Mrs. Trigleth did not disclose during *voir dire* that she went to the same church as the mother of one of the murder victims. On appeal, the defendant has not pursued the other grounds raised in his written motion for a new trial. The State responds that the trial court properly concluded that Mrs. Trigleth was free from prejudice when she determined the defendant's guilt or innocence.

Attached to the defendant's written motion for a new trial was the affidavit of Isaias Torres, one of the jurors in the defendant's case. In the affidavit Mr. Torres stated that "a fellow juror informed him that another juror sitting in judgment of the facts with them on the above-captioned case, knew the deceased, Marilyn Green's mother and attended church with her." He further stated that "this same Black female juror [Mrs. Trigleth], when the jury was given the case to deliberate on, entered the jury room and said as far as she was concerned, they could vote guilty right then, and she made this statement before any discussion was had on the evidence * * *."

The general rule in cases such as this involving information that is not disclosed by a juror during *voir dire* is that a motion

for a new trial will not be granted unless it is established that prejudice resulted. Whether the motion for a new trial is granted is within the discretion of the trial court. (*Fekelder v. Edgewater Automotive Co.* (1977), 68 Ill.2d 136, 139, 11 Ill.Dec. 292, 368 N.E.2d 900; *Department of Public Works & Buildings v. Christensen* (1962), 25 Ill.2d 273, 279–80, 184 N.E.2d 884.) This rule has been held applicable in criminal cases. See *People v. Harris* (1979), 74 Ill.2d 472, 24 Ill.Dec. 856, 386 N.E.2d 60.

The defendant contends that the questions the trial court asked Mrs. Trigleth just prior to dismissing the jury were not sufficient to determine whether prejudice in fact existed. He maintains that the court should have asked Mrs. Trigleth the extent of her relationship with Marilyn Green's mother. It is true that the court's inquiry could have, and possibly should have, been more searching to determine the nature of the relationship between the juror and Ms. Green's mother. However, the defendant preserved the issue and properly raised it in the motion for a new trial. At the hearing on this motion the defendant had the opportunity to establish the nature of the relationship in question and to show that he was prejudiced. He could have subpoenaed the juror and others to testify at the hearing on his motion for a new trial. Alternatively, counsel could have attached an affidavit from Mrs. Trigleth stating whether she was actually acquainted with the victim's mother and, if so, the extent of that relationship. Defense counsel chose to do neither.

The granting or refusing of a new trial because of the claimed disqualification of a juror is within the sound discretion of the trial court. (*People v. Cole* (1973), 54 Ill.2d 401, 414, 298 N.E.2d 705; *People v. Gold* (1967), 38 Ill.2d 510, 516, 232 N.E.2d 702.) Also, mere suspicion of bias or partiality is not sufficient to disqualify a juror. *People v. Collins* (1985), 106 Ill.2d 237, 274, 87 Ill.Dec. 910, 478 N.E.2d 267; *People v. Cole* (1973), 54 Ill.2d 401, 415, 298 N.E.2d 705.

The burden in this case was on the defendant to support the allegations of his post-trial motion. It was incumbent upon him to establish the nature of the relationship between the juror and the victim's mother. Although the defendant argues that the juror was a friend of the victim's mother, nothing in the record supports this conclusion. All that the record shows is that the juror, during the course of the trial, learned or realized that she knew the victim's mother as someone who attended the same church that she attended. The record does not even disclose the name of the victim's mother, nor does it disclose that the juror knew her name. Not only should the defendant have shown the nature of the relationship between the juror and the victim's mother, but he also had the burden of showing that he was prejudiced by this juror's service. (See *People v. Brinn* (1965), 32 Ill.2d 232, 239, 204 N.E.2d 724; *People v. Stacey* (1962), 25 Ill.2d 258, 270, 184 N.E.2d 866, *overruled on other grounds, People v. Nunn* (1973), 55 Ill.2d 344, 349, 304 N.E.2d 81; *People v. Berry* (1960), 18 Ill.2d 453, 459, 165 N.E.2d 257; *People v. Potts* (1949), 403 Ill. 398, 402–03, 86 N.E.2d 345; *People v. Phelps* (1944), 388 Ill. 618, 624, 58 N.E.2d 615; *People v. Coniglio* (1933), 353 Ill. 643, 655, 187 N.E. 799; *People v. Boyce* (1977), 51 Ill.App.3d 549, 562, 9 Ill.Dec. 403, 366 N.E.2d 914; *People v. Hall* (1973), 17 Ill. App.3d 1, 4, 307 N.E.2d 664.) If the defendant could not show that he was actually prejudiced, then the burden was on the defendant to establish that the relationship between the juror and the victim's mother was of such a character that a presumption of prejudice would arise therefrom. If the State could not rebut this presumption, the court could have granted a new trial. (See generally 24 C.J.S. *Criminal Law* sec. 1447 (1961).) The defendant has not sustained his burden of proof on this issue.

[4] The defendant further maintains that the statement Mrs. Trigleth made upon entering the jury room, considered along with her relationship with the victim's mother, "raise the suspicion" that her

verdict was based on evidence other than that presented at trial. Yet, as noted above, mere suspicion of bias or prejudice is not sufficient. (*People v. Cole* (1973), 54 Ill.2d 401, 415, 298 N.E.2d 705.) Mrs. Trigleth's statement in the jury room does not establish that she had previously determined the defendant's guilt. Nor was it improper for her to make the statement at that time; the jury had retired to the jury room to begin its deliberations. In doing so some member of the jury must, of necessity, be first to voice an opinion. The defendant speculates that Mrs. Trigleth "may have had some vendetta" against him. However, an equally reasonable explanation for her statement is that after attentively and conscientiously listening to all the evidence presented at trial, she concluded that the evidence against the defendant was overwhelming, which it was.

Likewise, Mrs. Trigleth's failure to realize that Marilyn Green's mother was the same woman who went to her church could easily be explained by the fact that she did not know the woman's name. Also, the fact that Mrs. Trigleth did not realize that she attended the same church until after the trial had begun would make it appear unlikely that she had a close relationship with the victim's mother. We note that Mrs. Trigleth never stated that she actually knew the victim's mother.

We hold that the trial court did not err in denying the defendant's motion for a new trial.

The last matter before us involves a motion by the State to strike a portion of the defendant's oral argument. This motion was taken with the case. During oral argument defense counsel contended that as a result of the trial court's denial of his oral motion for a new trial he was forced to choose between having his sentence determined by the court or by a tainted jury. Counsel maintained that this effectively left the defendant with no choice at all and that therefore the defendant was denied his right to have an impartial jury determine the appropriate sentence.

[5] We agree with the State that this issue has been waived. The defendant did not raise it in his written motion for a new trial (see *People v. Pickett* (1973), 54 Ill.2d 280, 296 N.E.2d 856) or in his appellate brief (see 87 Ill.2d R. 341(e)(7)). We note in passing, however, that defense counsel's recollection of the facts appears to be mistaken. The record indicates that the fact that Mrs. Trigleth went to the same church as the mother of one of the victims was not brought to the attention of the trial court until after the defendant waived his right to a jury for purposes of the death penalty hearing. During the jury-waiver proceeding the defendant did argue the possibility that the jury had been tainted because of an article in newspapers which were found in the jury room, but not that the jury was tainted by the presence of Mrs. Trigleth. However, the issue raised at trial has not been argued on appeal. The record indicates that the defendant made a knowing and intelligent waiver of the jury and did not do so because of any possible prejudice on the part of Mrs. Trigleth. In any event, our criminal code, in addition to providing for a waiver of the jury at the penalty hearing, also provides that for good cause shown, the court may discharge the jury that determined the defendant's guilt and impanel another jury for the sentencing hearing. (Ill.Rev.Stat.1981, ch. 38, par. 9-1(d)(2)(C).) The defendant never requested that another jury be impanelled. The motion by the State to strike this part of defendant's argument is allowed.

For the foregoing reasons, we affirm the defendant's convictions and sentences. The clerk of this court is directed to enter an order setting Wednesday, May 21, 1986, as the date on which the sentence of death, entered in the circuit court of Cook County, is to be carried out. The defendant shall be executed by lethal injection in the manner provided by section 119-5 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1983, ch. 38, par. 119-5). The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of

the institution wherein the defendant is confined.

Judgment affirmed.

CLARK, Chief Justice, dissenting:

In this case, a member of the jury that found the defendant guilty of murder *knew* the mother of one of the victims. They both attended the same church. I would hold that the defendant was deprived of the right to trial by an impartial jury, and I would reverse his conviction. Therefore, I respectfully dissent.

The majority holds that the defendant had the burden of either showing that he was prejudiced by Mrs. Trigleth's jury service (111 Ill.2d at 404, — Ill.Dec. at ——, 489 N.E.2d at 1336) or "that the relationship between the juror and the victim's mother was of such a character that a presumption of prejudice would arise therefrom." 111 Ill.2d at 404, — Ill.Dec. at ——, 489 N.E.2d at 1336.

The majority suggests that to establish this prejudice the defendant "could have subpoenaed the juror and others to testify at the hearing on his motion for a new trial" or "[defense] counsel could have attached an affidavit from Mrs. Trigleth stating whether she was actually acquainted with the victim's mother and, if so, the extent of that relationship." 111 Ill.2d at 403, — Ill.Dec. at ——, 489 N.E.2d at 1336.

The defendant did attach the affidavit of Mr. Torres, one of the jurors, to his written motion for a new trial. The information in the affidavit tended to establish that Mrs. Trigleth "knew" and "attended church" with the victim's mother and that Mrs. Trigleth had made up her mind to find the defendant guilty without conferring with her fellow jurors. This affidavit in my opinion raised a presumption of prejudice.

The majority's second suggestion, that defense counsel should have attached an affidavit of Mrs. Trigleth stating whether she was acquainted with the victim's mother and the extent of the relationship, is unrealistic. It is highly unlikely that a woman who has been named by defense counsel as possibly tainting a murder trial, because she did not properly reveal to the trial judge that she knew the victim's mother, would now cooperate with defense counsel and sign such an affidavit.

The majority engages in speculation regarding Mrs. Trigleth's relationship with the victim's mother. The majority states:

"Likewise, Mrs. Trigleth's failure to realize that Marilyn Green's mother was the same woman who went to her church could easily be explained by the fact that she did not know the woman's name. Also, the fact that Mrs. Trigleth did not realize that she attended the same church until after the trial had begun would make it appear unlikely that she had a close relationship with the victim's mother. We note that Mrs. Trigleth never stated she actually knew the victim's mother." 111 Ill.2d at 405, — Ill.Dec. at ——, 489 N.E.2d at 1336-37.

The majority could have speculated to the contrary. It could just as easily be true that Mrs. Trigleth realized that she knew the victim's mother and went to church with her and that she chose to remain on the jury to make sure that the defendant would get "proper punishment." Of course, all of this is speculation, but what is not speculation is the fact that the defendant's life is now hanging in the balance.

It may be true that Mrs. Trigleth never stated that she "knew" the victim's mother, but that was because the trial judge never asked her that question or any other specific questions which he should have asked to determine whether any possible prejudice existed. It seems to me that a substantial question had been raised as to this juror's possible partiality and the trial judge should have pursued it further.

In my dissent in *People v. Collins* (1985), 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267, I quoted from the case of *People v. Cole* (1973), 54 Ill.2d 401, 298 N.E.2d 705, wherein this court stated:

"The right to a trial by an impartial tribunal is so basic that a violation of the

right requires a reversal. (*Chapman v. California* [(1967), 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824]; *Tumey v. Ohio* [(1927), 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437].) The right to a jury trial guarantees to one accused of a crime a fair trial by a panel of impartial jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Turner v. Louisiana* [(1965), 379 U.S. 466, 471-72, 13 L.Ed.2d 424, 428, 85 S.Ct. 546, 549]." 54 Ill.2d 401, 411, 298 N.E.2d 705.

In summary, I believe the defendant was denied his right to trial by a panel of impartial jurors when one of the jurors knew and attended church with the mother of one of the victims, and therefore I believe the majority should have reversed the defendant's conviction.

It is for the above-enumerated reasons that I respectfully dissent.

GOLDENHERSH and SIMON, JJ., join in this dissent.

SIMON, Justice, also dissenting:

Although due process does not require a new trial every time a juror has been placed in a potentially compromising situation, what it does mean is "a jury capable and willing to decide the case solely on the evidence before it, and *a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.*" (Emphasis added.) (*Smith v. Phillips* (1982), 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78, 86). Thus, when the possible bias of a juror is raised, a defendant is entitled to a hearing on the issue at which he is allowed to participate meaningfully. (455 U.S. 209, 216-17, 102 S.Ct. 940, 945-46, 71 L.Ed.2d 78, 85-86.) Because the investigation of the juror's possible bias fell far short of these standards here, and because substantial evidence of bias appears on the record, I would reverse the conviction.

The trial judge apparently recognized that he had some obligation to make inquiry of the juror. He initially called upon the juror who "purportedly or allegedly went to * * * the same church" as the mother of one of the victims to identify herself. Mrs. Trigleth answered by stating "that didn't make any difference to me about that." Rather than probing the basis of her relationship with the victim's mother, the judge simply asked the juror several times in a leading fashion to reaffirm that her acquaintance with the mother did not influence her. The only other questions the judge asked were whether she recognized the name when he read the list of witnesses and at what point the juror became aware that she knew the victim's mother; on the latter question he accepted an inconclusive answer. The colloquy could have lasted only seconds.

This interrogation of Mrs. Trigleth was deficient in two respects. First, as Chief Justice Clark points out, the trial judge failed to explore the facts which may have established the juror's bias. For all the judge knew, the juror and the victim's mother could have been close friends. By failing to inquire in detail into their relationship, the court ignored the fact that "[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." (*Smith v. Phillips* (1982), 455 U.S. 209, 221-22, 102 S.Ct. 940, 948, 71 L.Ed.2d 78, 89 (O'Connor, J., concurring).) The difficulties inherent in exposing actively concealed or subconscious biases could hardly have been overcome by simply accepting and leading the juror into repeating her conclusory statement that she was not influenced by her relationship with the mother without determining what that relationship was.

This court's prior cases involving similar allegations of juror bias demonstrate that more extensive questioning was imperative. For example, in *People v. Davis* (1983), 95 Ill.2d 1, 69 Ill.Dec. 136, 447 N.E.2d 353, a juror advised the court during the course of trial that a friend of his was related to someone murdered in an incident with which the defendant may

have been connected. The subsequent interrogation disclosed the nature of his relationship with the friend, the friend's feelings about the killing, and the fact that the juror had not been personally acquainted with the victim; it also explored the questions of possible embarrassment to the juror from sitting on the jury and whether the incident would have any effect on his deliberations. Similarly, in *People v. Hycke* (1979), 77 Ill.2d 229, 32 Ill.Dec. 893, 396 N.E.2d 6, the court learned after the jury had been sworn that one juror's husband was a nephew of the man the defendant was charged with killing. Inquiry revealed that the juror's personal contacts with the deceased were limited to five or six meetings at family gatherings, that her relationship with the deceased would not influence her, and that her family had urged her not to sit on the jury.

By contrast, the court in the instant case made no effort to uncover the extent of the relationship between Mrs. Trigleth and the victim's mother or other facts relevant to the question of bias. The court, for example, did not determine at precisely what point during the trial the juror became aware that she knew the mother or why she failed to bring it to the judge's attention promptly.

The second reason that the interrogation of the juror was inadequate is because defense counsel was not permitted to participate. Following Mrs. Trigleth's final reiteration that her acquaintance with the victim's mother made no difference, the court stated that the jury would be dismissed. Although the majority opinion does not mention it, the record reveals that defense counsel then asked whether the "[d]efense [was] going to have any questions on this case," apparently before the jury was actually excused. The court's response was to repeat the order that the jury be dismissed.

The effective refusal of the trial judge to let defense counsel question the juror was error. In *Smith v. Phillips*, the Supreme Court found that determinations of juror bias can properly be made at a hearing "'with all interested parties permitted to participate.'" (See 455 U.S. 209, 216, 102 S.Ct. 940, 945, 71 L.Ed.2d 78, 85, quoting *Remmer v. United States* (1954), 347 U.S. 227, 230, 74 S.Ct. 450, 451, 98 L.Ed. 654, 656.) The correct procedure, allowing defense interrogation of a potentially biased juror, has been employed by the trial courts of this State in similar cases. (See, *e.g., People v. Davis* (1983), 95 Ill.2d 1, 69 Ill.Dec. 126, 447 N.E.2d 353; *People v. Harris* (1979), 74 Ill.2d 472, 24 Ill.Dec. 856, 386 N.E.2d 60; see also *United States v. Billups* (4th Cir.1982), 692 F.2d 320.) The failure to permit defense counsel here to interrogate the juror was an abuse of discretion.

The majority acknowledges that the trial judge's abbreviated inquiry "could have, and possibly should have, been more searching." (111 Ill.2d at 403, — Ill.Dec. at ——, 489 N.E.2d at 1336.) The majority opinion nonetheless concludes that no abuse of discretion occurred because the burden of establishing prejudice rested with the defendant and that burden could have been carried, at least in theory, by forcing a proper investigation on the court at a hearing on the post-trial motion. As I view the majority opinion, it both underestimates the importance of a prompt judicial inquiry into a juror's bias and misreads the record in sanguinely assuming that the judge would have permitted further questioning of the juror at a post-trial hearing.

Obviously, in cases in which a juror's potential bias comes to light only after the conclusion of the criminal proceedings, the hearing to determine whether such bias actually exists must necessarily occur in the context of a post-trial motion. However, common sense rejects the notion that resolution of the issue should also await a post-trial hearing when the possibility of prejudice is revealed, as here, prior to the dismissal of the jury. In the latter situation, an immediate inquiry is appropriate. (See, *e.g., People v. Davis* (1983), 95 Ill.2d 1, 69 Ill.Dec. 126, 447 N.E.2d 353; *People v. Hycke* (1979), 77 Ill.2d 229, 32 Ill.Dec. 893, 396 N.E.2d 6; *People v. Harris* (1979),

74 Ill.2d 472, 24 Ill.Dec. 856, 386 N.E.2d 60.) An immediate investigation, quite apart from the saving of judicial resources, best serves to correctly resolve the claim of bias.

As noted above, I also disagree with the court on another score: the speculative suggestion that defendant could have subpoenaed Mrs. Trigleth to testify at a post-trial hearing (111 Ill.2d at 403, — Ill.Dec. at ——, 489 N.E.2d at 1336.) Examination of relevant portions of the record, some of which are not excerpted in the majority opinion, leads me to the same conclusion defense counsel could have reached, namely, that no such testimony would have been permitted. Upon defense counsel's suggestion that a mistrial should be granted, the judge stated in part:

"This Court will state for the record that *in an unusual proceeding, I think probably the most unusual I have ever engaged in in all my years as a lawyer and as a Judge*, I did bring back the entire jury and I had not dismissed them and the lady that identified herself was under oath and said for the record that the facts that came to light after the case, sometime after the case had commenced, in earnest, didn't influence her whatsoever.

Accordingly, this Court felt that going beyond that regarding that issue is not—would not have been proper, would have invaded the sanctity of the jury and jury deliberation. Mr. Porter talked to and did, in fact request and have his constitutional right to a jury. *That lady was under oath. She was not on trial, Mr. Porter was.*" (Emphasis added.)

This statement makes clear that the trial judge believed that he had already, in a "most unusual" proceeding, gone above and beyond the call of duty in his questioning of the juror and that more searching inquiry would have been improper as an invasion of the "sanctity" of the jury. I can only surmise that the judge's opinion that Mrs. Trigleth could not be subjected to further interrogation without compromising jury deliberations or putting her "on trial" would not have been any different at a post-trial hearing and that any effort to question her at that point would have been rejected. Thus, counsel can hardly be faulted for failing to subpoena her.

The defendant only had the burden of establishing the juror's "disqualifying state of mind" (*People v. Cole* (1982), 54 Ill.2d 401, 413, 298 N.E.2d 705), not, as the majority states, that "he was prejudiced by this juror's service" (111 Ill.2d at 404, — Ill.Dec. at ——, 489 N.E.2d at 1336) or that the outcome of the trial was affected. (See 54 Ill.2d 401, 411, 298 N.E.2d 705 (harmless-error rule does not apply to claim that the jury was not impartial).) Although the actions of the trial judge severely limited his opportunity to make such a demonstration, I believe, with Chief Justice Clark, that there is sufficient evidence of bias on this record to require a new trial.

At the beginning of *voir dire*, the judge read a list of potential witnesses but omitted to instruct the jurors to state whether they recognized any of the names. Although it is understandable that Mrs. Trigleth could have initially missed or failed to recognize the name of Marilyn Green's mother in that list, at the point in the trial when she did recognize that someone she knew was involved, she had a duty to so inform the judge. Inasmuch as she thought her acquaintance with the victim's mother was sufficiently important to disclose that information to another juror, Mr. Torres, her failure to similarly inform the trial judge can hardly be dismissed as innocuous or merely unthinking. Rather, her apparent suppression of this relationship from the judge makes her impartiality suspect. Coupled with this failure to disclose, the evidence that upon entering the jury room and prior to any deliberations Mrs. Trigleth said that "as far as she was concerned, they could vote guilty right then" was, in my view, sufficient for the defendant to carry his burden of establishing the juror's bias.

It is no answer to say, as the majority does, that the defendant is at fault for not

making the right moves. The question of juror bias, unlike a mere evidentiary irregularity, goes to the heart of the judicial process. Whether or not the defendant exercised every available option, a guilty verdict in a case in which the process itself has been tainted cannot be affirmed.

The decision to uphold the conviction here debases the fundamental right to a "fair trial by a panel of impartial, 'indifferent' jurors" (*Irvin v. Dowd* (1961), 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 755). Because that right is the hinge upon which our entire system of criminal justice turns, I am compelled to dissent.

GOLDENHERSH, J., joins in this dissent.

Josephine ZEH, Appellant,
v.
John B. WHEELER et al., Appellees.
No. 60966.
Supreme Court of Illinois.
Feb. 21, 1986.

Action was brought for slip and fall due to alleged failure to properly maintain common stairway of apartment building. Following expiration of limitations period, complaint was amended to change the address on which property was located. The Circuit Court, Cook County, Brian B. Duff, J., held that amendment could not relate back and dismissed complaint and plaintiff appealed. The Appellate Court, First District, 126 Ill.App.3d 1155, 90 Ill.Dec. 880, 483 N.E.2d 27, affirmed, and the Supreme Court granted leave to appeal. The Supreme Court, Ryan, J., held that amendment could not relate back as it set up a cause of action which grew out of a different occurrence from that originally alleged.

Affirmed.

1. Limitation of Actions ⇐127(1)

Relation back of an amended pleading is permitted to avoid impact of statutes of limitations if: original pleading was timely filed and original and amended pleadings indicate cause of action asserted in amended pleading grow out of same transaction or occurrence set up in original pleading. S.H.A. ch. 110, ¶ 2-616.

2. Limitation of Actions ⇐127(5)

Amended complaint alleging injuries resulting from slip and fall on common stairway of apartment building which only alleged differently the address of building did not relate back, thus permitting dismissal when amended after limitations period had run; amended pleading set up a cause of action which grew out of different occurrence from that alleged in original pleading and was not a mere redescription of place at which incident allegedly occurred, even though properties had same management, where different properties with different ownership were described. S.H.A. ch. 110, ¶ 2-616(b).

3. Pleading ⇐1

Code of Civil Procedure reflects modern approach to pleading: resolution of litigation on merits and avoidance of elevating questions of form over questions of substance.

Alan D. Katz, David S. Pochis, Ltd. and Chase & Werner, Ltd., Chicago, for plaintiff-appellant, Josephine Zeh.

Berman & Trachtman, P.C., Chicago, (Edward J. Malek, of counsel), for defendants-appellees.

RYAN, Justice.

Plaintiff, Josephine Zeh, appealed from an order of the circuit court of Cook County dismissing with prejudice her amended complaint on the ground that the amend-

...t jamb the following sign, "Do Not Unlock or Enter ... Room By Order of Honorable R. Sklodowski," dated ...day. Any objection to that procedure?

MR. GURSEL: No.

(A recess was taken, after which the following proceedings were had outside the presence and hearing of the jury:)

THE COURT: Mr. Gursel, we are ready to receive the ...dict. Bring the jury out.

MR. GURSEL: Judge, if I have to poll, will you ask ... question was it then and is it now?

THE COURT: I'll have my clerk do that.

MR. GURSEL: I mean the language.

THE COURT: Was this and is this now your verdict.

(The following proceedings were within the presence and hearing of the jury:)

THE COURT: Please be seated as you come in, ladies and gentlemen.

Mr. Foreman, give your verdicts to the sheriff, please.

Madam Clerk, if you will please read the verdicts?

THE CLERK: We, the jury, find the defendant, Anthony Porter, guilty of the offense of murder of Jerry Hillard.

We, the jury, find the defendant, Anthony Porter,

...s

EDITOR'S NOTE

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guilty of the offense of murder of Marilyn Green.

We, the jury, find the defendant, Anthony Porter, guilty of the offense of unlawful use of a weapon.

We, the jury, find the defendant, Anthony Porter, guilty of the offense of unlawful restraint.

We, the jury, find the defendant, Anthony Porter, guilty of the offense of armed robbery.

THE COURT: Yes, Mr. Gursel?

MR. GURSEL: Your Honor, at this time, most respectfully, would you poll the jury, please?

THE COURT: Please poll the jury, Madam Clerk.

THE CLERK: When the deputy calls your name, please raise your hand and answer the question yes or no.

DEPUTY SHERIFF: Eric Selling.

THE CLERK: Was it and is this now your verdict?

MR. SELLING: Yes.

DEPUTY SHERIFF: Peter Rogala.

THE CLERK: Was this and is this still now your verdict?

MR. ROGALA: Yes.

DEPUTY SHERIFF: Lillie Trigleth.

THE CLERK: Was this and is this still now your verdict?

MISS TRIGLETH: Yes.

THE DEFENDANT: No.

THE COURT: I am sorry, Mr. Stagaberg.

MR. STAGABERG: Judge, does the State get rebuttal in this stage of the hearing?

THE COURT: I don't think so. With regards to this matter, I have reflected, I have lost sleep. It is all part of my job.

Anthony Porter, like a perverted shark in a frenzy of robbery, destruction, and death, you took two lives without reason, remorse, or shame, only to satisfy your appetite for violence.

Accordingly, I have considered all factors in aggravation and mitigation, and I unfortunately find no mitigating factors sufficient to preclude the imposition of the death sentence. Let me now speak to Larry Hillard and Andrew Green.

It is hereby ordered and adjudged by this Court that you, Anthony Porter, be committed to the custody of the Sheriff of Cook County, Illinois, to be taken from the bar of this Court to the County Jail of Cook County, Illinois, from whence he came and thereafter to be transported by the Sheriff of Cook County to the Illinois Department of Corrections, Joliet Correctional Center at Joliet, Will County, Illinois, and there to be turned over to the Warden

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff
vs. No. 82-7654
ANTHONY PORTER, Defendant

AFFIDAVIT

I, ISAIAS TORRES, being duly sworn, deposes and says:

1. That he was a juror in the above-captioned case.

2. That a fellow juror informed him that another juror sitting in judgment of the facts with them on the above-captioned case, knew the deceased, Marilyn Green's mother and attended church with her.

3. That he was present in Court when Judge Robert L. Skoldowski voir-dired the jurors as to who the juror was that knew Marilyn Green's mother and attended church with her.

4. That he was present when the only Black female juror identified herself as that person who knew Marilyn Green's mother and attended church with her.

5. That this same Black female juror, when the jury was given the case to deliberate on, entered the jury room and said as far as she was

concerned, they could vote guilty right then, and she made this statement before any discussion was had on the evidence in the case or any discussion of the testimony of any of the witnesses.

Isaias Torres
ISAIAS TORRES

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 29 DAY OF
September, 1983
NOTARY

[illegible] under Information number 80-2594 for which [illegible]sence was for a period of three years, in [illegible]ion of Chapter 38, Section 24-1(a-10), 24-1(b), [illegible] Illinois Revised Statutes 1981, as amended.

I want first to acquaint you now with the [illegible]les to this cause. On my left are Mr. Anthony Porter, [illegible] Defendant in this cause. Right next to him is [illegible]ay Mr. Akim Gursel.

[illegible]. GURSEL: Afternoon, ladies and gentlemen.

THE COURT: And E. Duke McNeil also his attorney.

[illegible]. MC NEIL: Good afternoon.

THE COURT: On my right is Miss Paula Daleo, [illegible]stant state's attorney, Mr. Szigetvari, assistant [illegible] attorney.

There may or may not be called as parties to [illegible] particular cause as witnesses the following named [illegible]: A Kenneth Doyle, a Clara Porter, a person known [illegible] Tobar Thomas, a Sarah Carter, a George Moody, a [illegible]oseph McKinney, Gladys Butley, Randy Peer, a Mr. Wilson, [illegible]ichy Welch and Clara Porter. An Officer Durda of the Chicago Police Department and various other officers as follows: Officer O'Neil, Officer Cleary and Officer D. Majchic, Officer Richards and Officer Neilson and Officer DiMarco, and Officer B. Johnson, Officer J. Thompson,

W. Grogan, Officer Demesco, and Officer J.
Officer D. Dwyer and Officer M. Hanky, Officer
Officer Rosen, Officer Jiminez, Officer Lakes,
Officer Anderson, Officer Kanicky, Officer R. Weiss,
Officer May, Officer Saltori, Officer Gray, Officer
Callahan, Officer Silverstein, Officer Tonsi, Officer
Loris, Officer Grifstein, Officer Hood, Officer Hobiam,
Officer Pachardo, J. Fitzgerald, Officer Sukowski, and
other personnel from the evidence and recovered
unit of the Chicago Police Department, personnel
the Chicago Crime Lab, a Mark Senior, a Bertha
and Assistant State's Attorney Kurstein, and
Assistant State's Attorney Rosen. Henry Williams,
Archibald Young, Michael Hood, Cora Hollis, Clyde Green,
Eugene Beckwith, William Taylor, Roy Davis, Kenny Doyle,
Burnett, Kenneth Edwards.

Personnel from Provident Hospital but not limited to these particular people are Dr. Kelsic, personnel from the Billing Hospital but not limited only to Dr. Lichter, a Mary Ann Furlong and Officer DeMarco. Officer Deeday, Officer G. Salatore, Officer J. Fitzgerald, Officer Johnson, Officer Hobiak, Officer Pachardo, a Henry Williams and Assistant State's Attorney Hobiam.

Those are potential witnesses that could be this cause.

Ladies and gentlemen, before I get into questions in earnest, has the potential of taking approximately two weeks or near two weeks, would that in view impending religious holiday that is sometime in two-week period, and/or any economic or other thing that could be visited upon you, would anyone -- any of you who might have such a problem, religious otherwise as I have just described, since this case possibly last two weeks, would they raise their

Your name, sir?

PROSPECTIVE JUROR SEGAL: Segal.

THE COURT: Your name?

PROSPECTIVE JUROR BOYCE: Boyce, B-o-y-c-e.

PROSPECTIVE JUROR KAHLE: Kahle, K-a-h-l-e.

PROSPECTIVE JUROR KURRANO: Kurrano, K-u-r-r-a-n-o.

PROSPECTIVE JUROR HUDDY: Huddy, H-u-d-d-y.

PROSPECTIVE JUROR BRUCE: Druce, B-r-u-c-e.

PROSPECTIVE JUROR CARDANO: Cardano, C-a-r-d-a-n-o.

THE COURT: Yes, sir.

PROSPECTIVE JUROR SCHULTZ: Schultz, S-c-h-u-l-t-z.

PROSPECTIVE JUROR BINGHAM: Bingham, B-i-n-g-h-a-m.

not dismissed, even though -- and I am about to bring them out. There is no need to reswear them. I still consider them to be under oath.

Ladies and gentlemen, I did not formally dismiss you so you are still under oath, under the oath that you took as jurors. It was brought to my attention before I actually formally dismissed you that one of the jurors stated that he knew that some other juror purportedly or allegedly went to church -- to the same church as one of the decedent's mother. Is that right, was that your -- please identify yourself.

MRS. TRICKLET: Yes, but that didn't make any difference to me about that.

THE COURT: Thank you, ma'am. It didn't make any difference?

MRS. TRICKLET: No.

THE COURT: Ma'am, your name again?

MRS. TRICKLET: Lilly B. Tricklet.

THE COURT: It didn't make any difference to you, you abided by your oath and did you recognize that fact when I had read you the name of all the witnesses in the beginning before we ever started, you didn't recognize that?

MRS. TRICKLET: No.

THE COURT: When did you finally recognize --

MRS. TRICKLET: After it had got started and everything was going on.

THE COURT: But, it made no difference to you, is that right?

MRS. TRICKLET: No, that is right.

THE COURT: I will now formally dismiss you. You are all dismissed.

MR. MC NEIL: Defense going to have any questions on this case?

THE COURT: The jury is dismissed. We will proceed as indicated.

(The jury was excused from further consideration in the above entitled cause and the following proceedings were had.)

MR. GURSEL: I would like to speak for the record. Judge, this woman has indicated that she -- this case was not over when it came to her attention that she knew a member of this family. That matter was suppose to have been brought to this Court's attention. We had two alternates, two alternate jurors. At this point and time I am asking this Court for an oppor-

unity to present information to this Court to prepare for a mistrial and respectfully come before this Court and ask that the judgments entered on the record of conviction as to Anthony Porter be set aside and that he be given a new trial, Judge.

THE COURT: Any motion for mistrial relative to what just occurred are premature at this time. If anything, you can present those after the entire hearing.

This Court will state for the record that in an unusual proceeding, I think probably the most unusual I have ever engaged in in all my years as a lawyer and as a Judge, I did bring back the entire jury and I had not dismissed them and the lady that identified herself was under oath and said for the record that the facts that came to light after the case, sometime after the case had commenced, in earnest, didn't influence her whatsoever.

Accordingly, this Court felt that going beyond that regarding that issue is not -- would not have been proper, would have invaded the sanctity of the jury and jury deliberation. Mr. Porter had talked to and did, in fact, request and have his constitutional right to a jury. That lady

was under oath. She was not on trial, Mr. Porter was.

MR. GURSEL: If I may, Judge.

THE COURT: Yes.

MR. GURSEL: Judge, with all due respect to the Court and I said this in earnest, I believe that the Court with no intended disrespect of Mr. Porter's rights has abused its discretion. I believe that the Court should have questioned this juror in detail as to her relationship to that family and to what particular point and time she had knowledge, how long she has had the knowledge and rationale for not bringing this to the Court's attention in view of fact that there are two alternates here.

THE COURT: This Court feels it didn't abuse its discretion. This Court hereby accordingly denies motion for mistrial. At a further time you may put it in writing, whatever you state in writing, you are welcome. We will proceed with the hearing at 1:30.

(A recess was taken to 1:30 o'clock P.M. of the same day, Thursday, the 8th day of September, A.D., 1983.)

CERTIFICATE OF SERVICE 85-6977

The undersigned attorney certifies that on May 22, 1986, he caused a copy of the foregoing Petition For a Writ of Certiorari and Motion to Proceed In Forma Pauperis to be served by first-class mail, postage pre-paid, upon the following parties:

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SUPREME COURT, U.S.

85-6977

May 21, 1986

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Attn: Sandy Spagnolo

Re: Anthony Porter v. Illinois,
A-751

To the Office of the Clerk:

Please accept for filing the enclosed petition for writ of certiorari and motion for leave to proceed in forma pauperis.

The petitioner is presently incarcerated at the Illinois state penitentiary in Pontiac, Illinois. (At the time the affidavit in support of the motion was originally drafted, however, the petitioner was incarcerated at the state penitentiary in Menard, Illinois; therefore, the affidavit states that he is at the Menard penitentiary). Although the petitioner signed his affidavit, he failed to have it notarized, and we did not receive the petitioner's affidavit until today, May 21, 1986.

Pursuant to the instructions of the Clerk's Office, we have attached the petitioner's affidavit to his motion to proceed in forma pauperis. As soon as we receive a properly notarized affidavit from the petitioner, we will send it immediately to the Court and all other parties to this action.

Thank you very much for your assistance.

Very truly yours,

William F. Lloyd
One of the Attorneys
for Petitioner

WFL/mg
Enclosures

cc: Mark L. Rotert, Esq.
Joan S. Cherry, Esq.

EDITOR'S NOTE

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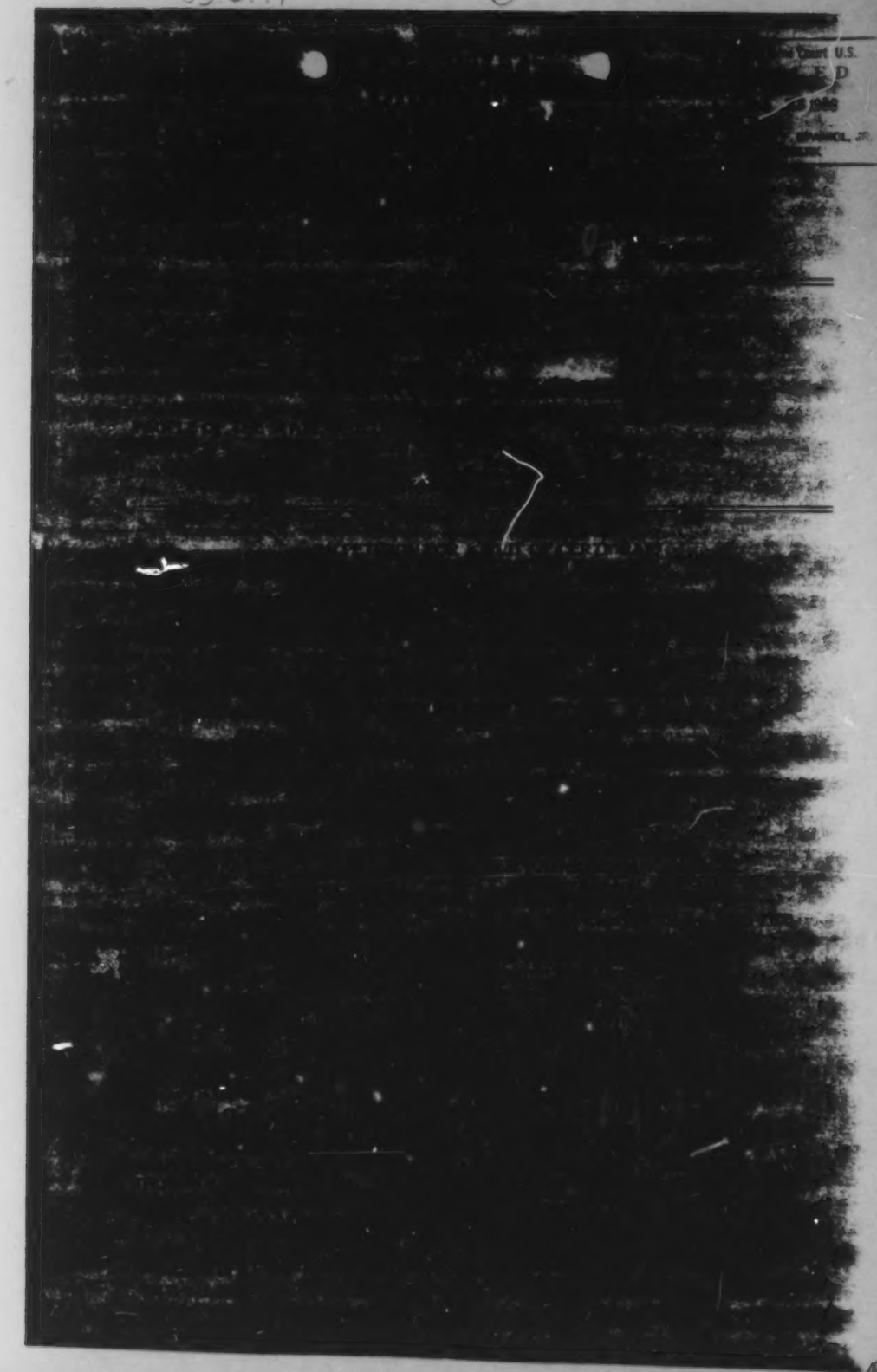
85-6977



QUESTION PRESENTED

Whether the fact that a juror had attended the same church as the mother of one of the deceased murder victims denied petitioner his right to a fair trial before an impartial jury, where the mother of Marilyn Green did not testify at trial, where the juror did not even recognize the mother's name when the list of potential witnesses was read during jury selection, where the verdict was consistent with the overwhelming evidence of guilt, and where the trial judge questioned the juror and determined that the verdict was free from bias.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCOTBER TERM, 1985

ANTHONY PORTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner was found guilty or armed robbery, unlawful restraint, and two counts of murder and unlawful use of weapons, following a jury trial in the Circuit Court of Cook County, Illinois. Petitioner waived the jury for purposes of sentencing, and elected to have Judge Robert L. Sklodowski decide the relevant issues on the question of the death penalty. Judge Sklodowski found that Petitioner was eligible for the death penalty and subsequently sentenced Petitioner to death. Petitioner's convictions and sentence were affirmed by the Illinois Supreme Court in a decision reported at People v. Porter, 111 Ill.2d 386, 489 N.E.2d 1329 (1986) (Pet's App. A1).

JURISDICTION

Petitioner has filed a petition for a writ of certiorari and this Court's jurisdiction has been properly invoked pursuant to 28 U.S.C. 1257 (3).

STATEMENT OF THE CASE

The facts relevant to the issues raised by Petitioner are adequately set forth in the opinion of the court below, and need not be restated at length. Respondent directs this Court's attention to the argument portion of this Brief in Opposition, wherein the facts pertaining to the claim of error are discussed.

REASON FOR DENYING THE WRIT

THE FACT THAT A JUROR HAD ATTENDED THE SAME CHURCH AS THE MOTHER OF ONE OF THE DECEASED MURDER VICTIMS IN NO WAY DENIED PETITIONER HIS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY, WHERE THE MOTHER OF MARILYN GREEN DID NOT TESTIFY AT TRIAL, WHERE THE JUROR DID NOT EVEN RECOGNIZE THE MOTHER'S NAME WHEN THE LIST OF POTENTIAL WITNESSES WAS READ DURING JURY SELECTION, WHERE THE VERDICT WAS CONSISTENT WITH THE OVERWHELMING EVIDENCE OF GUILT, AND WHERE THE TRIAL JUDGE QUESTIONED THE JUROR AND DETERMINED THAT THE VERDICT WAS FREE FROM BIAS.

After his convictions and sentence were affirmed by the Illinois Supreme Court, Petitioner filed the instant petition for a writ of certiorari. Petitioner contends he was denied a fair trial before an impartial jury because of a juror's relationship to the mother of one of the deceased murder victims. Petitioner further contends that he was denied an opportunity to actually prove bias, and that the trial court's questioning of this juror was inadequate. The People maintain that the fact that a juror had attended the same church as the mother of one of the victims in no way denied Petitioner his right to a fair trial before an impartial jury, where the mother of Marilyn Green did not testify at trial, where the juror did not evern recognize the mother's name when the list of potential witnesses was read during jury selection, where the verdict was consistent with the overwhelming evidence of guilt, and where the trial judge questioned the juror and determined that the verdict was free from bias. The People further maintain that no "relationship" existed, and that Petitioner had an adequate opportunity to establish bias at his hearing on a motion for a new trial, but failed to sustain his burden of proof.

The verdict in the instant case was returned on September 7, 1983, by a jury which included Lillie B. Trigleth. The jury was sent home for the night and requested to return for the death hearing the following morning. (R. 899-900) The next day, the defendant, Anthony Porter, waived the jury and elected to have the court determine his sentence. (R. 917)

The court then brought the jury out to dismiss them. (R. 932)

The follwoing colloquy occurred between the court and juror Trigleth.

> THE COURT: Ladies and gentlemen, I did not formally dismiss you so you are still under oath, under the oath that you took as jurors. It was brought to my attention before I actually formally dismissed you that one of the jurors stated that he knew that some other juror purportedly or allegedly went to church -- to the same church as one of the decedent's mother. Is that right, was that your -- please identify yourself.
>
> MRS. TRICKLET [sic]: Yes, but that didn't make any difference to me about that.
>
> THE COURT: Thank you, ma'am. It didn't make any difference?
>
> MRS. TRICKLET: No.
>
> THE COURT: Ma'am, your name again?
>
> MRS. TRICKLET: Lilly B. Tricklet.
>
> THE COURT: It didn't make any difference to you, you abided by your oath and did you recognize that fact when I had read you the name of all the witnesses in the beginning before we even started, you didn't recognize that?
>
> MRS. TRICKLET: No.
>
> THE COURT: When did you finally recognize --
>
> MRS. TRICKLET: After it had got started and everything was going on.
>
> THE COURT: But, it made no difference to you, is that right?
>
> MRS. TRICKLET: No, that is right.
>
> THE COURT: I will now formally dismiss you. You are all dismissed. (R. 933-934)

It is clear that the juror's knowledge of the victim's family was remote. There is no allegation that the juror knew the victim, Marilyn Green, at all. Nor is it alleged that the victim's mother was a friend of Mrs. Trigleth's. The record discloses only that the ladies had attended the same church. (R. 953) Indeed, Mrs. Trigleth did not even recognize the mother's name when the court read it at the outset of jury selection. (R. 933)

Petitioner's consistent reference to a "relationship" between juror Trigleth and Marilyn Green's mother is misleading. Petitioner's contention that juror Trigleth failed to inform the court during the vior dire of this "relationship," ignores the fact that juror Trigleth did not recognize the mother's name when read by the court during jury selction. The fact that juror Trigleth did not later inform the court of any "relationship" between her and a witenss was not due to an effort to mislead or deceive. Aside from the fact that mother of the victim, Marilyn Green, never testified and was not a witness, juror Trigleth swore to the court that she was not biased by the fact that she had attended the same church as the mother of Marilyn Green. (R. 933-934)

Petitioner asserts that an "inference of bias" in this case was strengthened by the post-trial affidavit of another juror, Isaias Torres. The affidavit avers, in relevant part:

> 5) that this same black female juror (Mrs. Trigleth) when the jury was given the case to deliberate on, entered the jury room and said, as far as she was concerned, they could vote guilty right then, and that she made this statement before any discusion was had on the evidence in the case or any discussion of the testimony of any of the witnesses. (R. 1206-1207)

The People maintain that the Illinois Supreme Court correctly held that juror Trigleth's statement was proper. People v. Porter, 111 Ill. 2d 386, 405, 489 N.E.2d 1329 (1986). The statement was made after the jury had heard all of the evidence and had been instructed on the law. The jury had retired to deliberate. Therefore, the comment was timely and appropriate. Nothing which is contained in the post-trial affidavit indicates that juror Trigleth's comment was made merely because she had attended the same church as the mother of one of the victims. Rather, as noted by the Illinois Supreme Court, Mrs. Trigleth's comment was consistent with the evidence of defendant's guilt, which was overwhelming. Id.

Petitioner contends that he was denied the opportunity to prove actual bias because the trial court denied defense counsel's request that juror Trigleth be questioned further. Petitioner's argument ignores the fact that

the trial judge had observed the juror's demeanor during both voir dire and post-verdict questioning, and was satisfied by her repeated assurances that the fact that a victim was the daughter of someone who had attended her church made no difference in the case. Moreover, the Illinois Supreme Court properly held that Petitioner failed to meet his burden of proof at the hearing on his motion for a new trial. Petitioner concedes that the post-trial hearing "consisted of a short argument by counsel for petitioner and for the state." (Pet. p. 6) Nevertheless, Petitioner now contends that the trial court would never permit further questioning of juror Trigleth and that an attempt to obtain a court ordered subpoena for juror Trigleth would have been futile. The People maintain that Petitioner's contentions are merely self-serving speculation and do not excuse his failure to sustain his burden of proving bias and prejudice. Petitioner never requested a subpoena, and although an affidavit of juror Torres was presented and considered in his motion for a new trial, Petitioner fails to explain why no attempt was made to secure an affidavit of juror Trigleth or any other person. As the Illinois Supreme Court correctly held, Petitioner failed to show actual prejudice, and also failed to show that a relationship existed of such a character that a rebuttable presumption of prejudice would arise therefrom.

Petitioner is entitled to a jury of his peers, free from taint or bias. Nowhere in the law is it written that the defendant is entitled to a jury of strangers. Such a rule would render all trials in small towns or rural areas impossible. It is reasonable to assume that except for in large urban areas, it is common for potential jurors to be acquainted with the facts or to have some knowledge of the parties participating. The test, of course, is their ability to keep open minds and to render unprejudiced and unbiased verdicts in spite of what they have heard and what they know.

In People v. Cole, 54 Ill.2d 401, 298 N.E.2d 705 (1973), the Illinois Supreme Court found that the trial court did not err in refusing to dismiss a juror for cause despite the fact that the juror, Russell Davis, knew both the State's Attorney and an Assistant State's Attorney, and one of the deceased victims. Davis also had lived next door to one of the State's witnesses, a

doctor, who had also been Davis' family physician. Another witness for the State was married to Davis' son. Davis was also a friend of the Sheriff, another material witness, and had recently served as treasurer of the campaign fund for the Sheriff. Davis had also discussed the case with the Sheriff. Davis' wife was a deputy for the Board of Review and had often assisted defense counsel with matters before the Board. Id., 54 Ill.2d at 411-413. The Illinois Supreme Court held in Cole that mere suspicion of bias is not sufficient to disqualify a juror. Id. at 415.

In the case sub judice, juror Trigleth eradicated from the record even the suspicion of bias by her post-verdict assurance that her mere acquaintance with a victim's mother made no difference to her decision in the case. (R. 933-934)

As this Honorable Court stated in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 1642-1643 (1961), "It is not required that jurors be totally ignorant of the facts and issue involved.... [I]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court." In the instant case, a juror's acquaintance with a victim's mother, who was not a witness, is the sole basis for Petitioner's request of this Court to exercise its discretion. No issue of national importance is presented, and a reversal of defendant's convictions for the reason stated would prevent the majority of jurisdictions in the United States from conducting jury trials.

Petitioner relies on Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), where a juror, during defendant's trial, applied for employment as an investigator in the District Attorney's Office and the prosecuting attorneys, upon being informed of the application, withheld this information from the trial court and defense counsel until after the trial. At a post-trial hearing, the trial judge ruled that these events did not influence the verdict. This Court upheld the trial judge's ruling and stated:

> "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.... [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."

Id., 455 U.S. at 217, 102 S.Ct. at 946.

In the instant case, as in Smith v. Phillips, supra, Petitioner was given the opportunity at a post-trial hearing to show bias, and he failed to sustain his burden of proof. Petitioner was not denied a hearing, and was not prevented from calling witnesses. Moreover, the trial court determined from questioning juror Trigleth that her verdict was based on the evidence, which was overwhelming, and not on any acquaintance to a victim's mother.

For all of the above reasons, the People submit that Petitioner is not entitled to a writ of certiorari.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

ANTHONY PORTER *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 85–6977. Decided October 14, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

I would grant this petition for certiorari to consider the extent of the obligations our decision in *Smith* v. *Phillips*, 455 U. S. 209 (1982), imposes on a trial judge confronted with a claim of juror bias.

I

Petitioner Anthony Porter was convicted of two murders committed in the course of an armed robbery and was sentenced to death. During voir dire, the trial judge read a list of potential witnesses, including the mother of Marilyn Green, one of the victims. He did not ask whether any of the prospective jurors knew any of the persons on the list, and none of them volunteered that they did. After the jury returned a guilty verdict, petitioner waived his right to a jury at the penalty proceeding. Before the judge dismissed the jurors, however, he addressed them as follows:

> "THE COURT: It was brought to my attention before I actually formally dismissed you that one of the jurors stated that he knew that some other juror purportedly or allegedly went to church—to the same church as one of the decedent's mother. Is that right, was that you—please identify yourself.
>
> MRS. TRICKLET:* Yes, but that didn't make any difference to me about that.

*The trial transcript incorrectly lists the juror's name as Tricklet, rather than Trigleth.

THE COURT: Thank you, ma'am. It didn't make any difference?

MRS. TRICKLET: No

THE COURT: Ma'am, your name again?

MRS. TRICKLET: Lilly B. Tricklet

THE COURT: It didn't make any difference to you, you abided by your oath and did you recognize the fact when I had read you the name of all the witnesses in the beginning before we even started, you didn't recognize that?

MRS. TRICKLET: No.

THE COURT: When did you finally recognize—

MRS. TRICKLET: After it had got started and everything was going on.

THE COURT: But, it made no difference to you, is that right?

MRS. TRICKLET: No, that is right.

THE COURT: I will now formally dismiss you. You are all dismissed." *People* v. *Porter*, 111 Ill. 2d 386, 397–398, 489 N. E. 2d 1329, 1333–1334 (Ill. 1986)."

Defense counsel was not permitted to question Mrs. Trigleth. After he suggested that "the Court should have questioned this juror in detail as to her relationship to that family," *id.*, at 398, 489 N. E. 2d, at 1334, the judge made the following statement:

> "This Court will state for the record that in an unusual proceeding, I think probably the most unusual I have ever engaged in in all my years as a lawyer and as a Judge, I did bring back the entire jury and I had not dismissed them and the lady that identified herself was under oath and said for the record that the facts that came to light after the case, sometime after the case had comenced, in earnest, didn't influence her whatsoever.
>
> "Accordingly, this Court felt that going beyond that regarding that issue is not—*would not have been proper, would have invaded the sanctity of the jury and jury deliberation.* Mr. Porter talked to and did, in fact request and have his constitutional right to a jury. The lady was under oath. She was not on trial, Mr. Porter was." *Id.*, at 413–414, 489 N. E. 2d, at 1339 (emphasis supplied).

Petitioner moved for a new trial. He submitted the affidavit of Isaias Torres, the juror who had brought the matter to the court's attention. In his affidavit, Torres stated that "a fellow juror informed him that another juror sitting in judgment of the facts with them . . . knew the deceased, Marilyn Green's mother and attended church with her." *Id.*, at 402, 489 N. E. 2d, at 1335. He further stated that "this same Black female juror, when the jury was given the case to deliberate on, entered the jury room and said *as far as she was concerned, they could vote guilty right then*, and she made this statement before any discussion was had on the evidence . . . ." *Ibid* (emphasis supplied). At the hearing on petitioner's motion for a new trial, which was held before the same judge, Mrs. Trigleth was not called as a witness. After a brief oral argument, the judge denied the motion.

The Illinois Supreme Court affirmed the trial court's denial of petitioner's motion for a new trial, with three justices dissenting. *People* v. *Porter*, *supra*. Although the State Supreme Court recognized that the trial court's inquiry "could have, and possibly should have, been more searching," it considered the ruling to be within the trial judge's "sound discretion." *Id.*, at 403, 489 N. E. 2d, at 1336. The State Supreme Court concluded that "[t]he burden in this case was on the defendant to support the allegations of his post-trial motion. . . . Not only should the defendant have shown the nature of the relationship between the juror and the victim's mother, but he also had the burden of showing that he was prejudiced by this juror's service." *Id.*, at 404, 489 N. E. 2d, at 1336.

II

The right to a trial by an impartial jury lies at the heart of due process. See, *e. g.*, *Irwin* v. *Dowd*, 366 U. S. 717, 721–722 (1961). This Court has held that due process requires both "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982). When a substantial question of juror bias is presented to the trial court, as it was in this case, we have held that the defendant is entitled to a hearing "'with all interested parties permitted to participate.'" *Id.*, at 216 (quoting *Remmer* v. *United States*, 347 U. S. 227, 230 (1954)).

Under *Smith* v. *Phillips*, *supra*, the trial judge's inquiry into juror bias in this case fell far short of the minimum required by the Due Process Clause of the Fourteenth Amendment. The judge merely called on the juror to identify herself and then asked her "several times in a leading fashion to reaffirm that her acquaintance with the mother did not influence her" in a colloquy that "could have lasted only seconds." *People* v. *Porter*, *supra*, at 410, 489 N. E. 2d, at 1339 (Simon, J., dissenting). The trial judge failed to ascertain to any meaningful degree the extent and nature of her relationship with the victim's mother and the point at which she became aware that she was acquainted with the mother. The juror's vague statement that she realized it "[a]fter it had got started and everything was going on" suggests only that she was not aware of it at voir dire. She was never asked to explain why she had not brought the matter to the court's attention when she realized the connection; had she done so, one of the alternate jurors could have taken her place. Moreover, the trial court did not allow defense counsel to question her.

The State contends that petitioner had an opportunity to explore the issue of bias at the post-trial hearing on his motion for a new trial. That hearing, however, was woefully inadequate when measured by our decisions in *Phillips* and *Remmer*. At a minimum, due process requires that the defendant be allowed to question the juror on the issue of bias. See *Smith* v. *Phillips*, *supra*, at 217 n. 7 ("determinations in *Remmer*-type hearings will frequently turn upon the testimony of the juror in question"); see also *id.*, at 222 (O'CONNOR, J., concurring). The Illinois Supreme Court criticized defense counsel for failing to call Mrs. Trigleth or obtain an affidavit from her, *People* v. *Porter*, *supra*, at 403, 489 N. E. 2d, at 1336. However, in light of the trial judge's insistence on the sanctity of the jury's deliberation and his refusal to allow defense counsel to question Mrs. Trigleth while she was under oath, counsel reasonably considered himself foreclosed from contacting her in connection with his motion for a new trial before the same judge. Thus, while petitioner had the burden of showing both bias and actual prejudice, the trial judge's admonitions appeared to deprive him of the only means of doing so.

I continue to believe that the defendant should not bear the burden of showing actual prejudice when the probability of bias is substantial, as it is in this case, see *Smith* v. *Phillips*, *supra*, at 224 (MARSHALL, J., dissenting). However, petitioner never even had the opportunity of demonstrating prejudice due to juror bias. This violated his right to due process and leaves in doubt the impartiality of the jury that convicted him in this capital case. Accordingly, I dissent from denial of the petition for certiorari.